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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL. FUHRMAN, ET AL., ETC.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY, ETC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

STATEMENT AS TO JURISDICTION

MAX RASKIN,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, INDIVIDUALLY AND AS OFFICERS OF LOCAL 18, UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION, AND LOCAL 18, UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA (CIO),

Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY AND AS COMMISSIONERS CONSTITUTING THE WISCONSIN EMPLOYMENT RELATIONS BOARD, AND THOMAS E. FAIRCHILD, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND THE MILWAUKEE GAS LIGHT COMPANY, A WISCONSIN CORPORATION,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclos-

ing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause.

Opinion Below

The opinion of the District Court for the Eastern District of Wisconsin, is reported in 90 Fed. Sup. 347. A copy of the opinion, findings of fact, conclusions of law and judgment are attached hereto as Appendix A.

Jurisdiction

The judgment of the district court was entered on June 14th, 1950. A petition for appeal is presented to the district court herewith, to-wit, on August 8th, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2281.

Questions Presented

Is a judgment of the Circuit Court of Milwaukee County, affirmed by the Supreme Court of Wisconsin, dismissing a complaint on a general demurrer, *res judicata* in a new action between the same parties in the United States District Court, based on a complaint containing sixteen allegations of material fact, which were not in the complaint in the State case?

Does subchapter III of Chapter 111 Wisconsin Statutes, 1947, violate the 13th and 14th Amendments to the Constitution of the United States?

Is subchapter III of chapter 111 in conflict with the Labor-Management Relations Act of 1947?

Statutes Involved

Subchapter III, Chapter 111 Wisconsin Statutes, 1947 (Vol. 1, page 1896), and the Labor-Management Relations Act 1947, are set forth in Appendix B hereto.

Statement

This is an action to restrain the enforcement of a statute of the State of Wisconsin, on the ground that it violates the 13th and 14th Amendments to the United States Constitution and also is in conflict with the Federal Labor-Management Relations Act of 1947.

The District Court for the Eastern District of Wisconsin, declined to pass on the merits of the case and dismissed the complaint, holding that a judgment in a previous action between the same parties in a state court was *res judicata*, one judge dissenting.

The judgment of the state court was entered by the Circuit Court of Milwaukee County on the 6th day of January, 1950.

This was an action for Declaratory relief. The defendants demurred to the complaint on the grounds that the complaint did not state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrers and the Supreme Court of Wisconsin affirmed the decision of the Circuit Court.

A copy of the judgment of the Circuit Court was received in evidence as an exhibit and is part of the record transmitted to this Court.

The instant case was commenced on the 4th day of October, 1949, and the amended complaint contains 16 allegations of material fact, which were not in the state court complaint.

These allegations are set out in paragraphs 20, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38 and 39 of the amended complaint.

The opinion of the Wisconsin Supreme Court affirming the judgment of the Circuit Court is reported in 255 Wis. 154.

The Questions are Substantial

The Wisconsin Statute (Sec. 111.62) makes any concerted action of Public Utility employees which causes a work stoppage, or slowdown, that interrupts an essential service, a criminal offense, punishable by confinement in the common jail.

It provides that upon petition by either party, any dispute involving labor relations must be settled by arbitration. The award is final and conclusive, subject only to judicial review (Sec. 111.54).

The arbitrators are selected by the Wisconsin Employment Relations Board. The parties have no part in the appointments.

It is the contention of the plaintiffs that this compulsory arbitration is in direct conflict with the Federal Labor-Management Relations Act of 1947 as amended.

The Wisconsin Act also provides the Wisconsin Employment Relations Board may file an action in the Circuit Court for an injunction restraining any violation of the Act (Sec. 111.63).

The plaintiffs contend that the Act violates the 13th and 14th Amendments of the Constitution of the United States.

The Act directly affects the labor relations of many thousands of Public Utility employees and places them in a situation in bargaining relations radically different from any other employees in the state.

Whether or not a judgment of a state court, based on a general demurrer is *res judicata*, concluding a United States Court from inquiring into the claimed unconstitutionality of a state law, is of great public interest.

The District Court was in error in not holding that the construction of a state statute by the court of last resort, did not conclude it from inquiring into the effect of that construction upon the Laws of the United States.

It is submitted that the District Court failed to recognize the impact the Wisconsin Statute has upon the laws of the United States.

Respectfully submitted,

(S.) MAX RASKIN,
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Milwaukee, Wisconsin.

APPENDIX A

Opinions

Findings of Fact and Conclusions of Law

Judgment

U. S. Dist. Court, East. Dist. of Wis. Filed April 28, 1950. B. H. Westfahl, Clerk.

Endorsed: "Filed Apr. 28, 1950. B. H. Westfahl, Clerk."

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

Arthur St. John, et al., *Plaintiffs,*

v.

Wisconsin Employment Relations Board, et al., *Defendants*

Opinion

Plaintiffs bring this action individually and as officers of Local 18, United Gas, Coke and Chemical Workers (CIO) (hereinafter called the "union"), upon behalf of all the union members who are employees of the corporate defendant. Plaintiffs seek a permanent injunction enjoining and restraining the enforcement of subchapter 3 of Chap. 111, Wis. Stats. of 1947,[1] sometimes referred to as the Public Utility Anti-Strike Law.[2]

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[1] The Wis. Stats. designate this section as subchapter III of Chap. 111. To void confusion we shall refer to this section as subchapter 3 of Chap. 111.

[2] Subchapter 3 of Chap. 111 contains a legislative declaration of policy that "the interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare." It also imposes upon employers and employees the duty of reaching agreements on wages and working

They also seek a declaratory judgment that said subchapter of the statutes is invalid. Defendants Gooding, Fitzgibbons and Rule are the individual commissioners comprising the Wisconsin Employment Relations Board. Defendant Fairchild is the Attorney General for the State of Wisconsin. The corporate defendant (hereinafter called the "company") is a public utility under Wisconsin law, and is the employer of approximately 770 men who are members of the union. The company's utility service is rendered in an area entirely within the State of Wisconsin; however it purchases a substantial portion of its supplies and materials outside the State, and it furnishes gas to manufacturing concerns that produce goods for interstate commerce.

Commencing in June, 1937, and annually thereafter including June, 1948, the union and the company entered into collective bargaining agreements. On August 1, 1943, the Union was certified by the National Labor Relations Board as the exclusive bargaining representative for the employees of the company. The most recent contract expired on June 1, 1949.

In September, 1949, the union filed a petition with the National Labor Relations Board, charging that the company was guilty of an unfair labor practice by refusing to bargain with the union. The National Labor Relations Board did not take any action on this complaint. Thereafter the union and the company did engage in collective bargaining covering wages, pensions and other conditions of employment, but no agreement was reached. The Wisconsin Employment Relations Board then appointed a conciliator whose efforts to bring the union and the company into agree-

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conditions through collective bargaining. It authorizes the Wisconsin Employment Relations Board to appoint a conciliator when the bargaining process reaches a stalemate (Sec. 111.54) and, where interruption of essential service is likely, authorizes the Wisconsin Employment Relations Board to appoint arbitrators (Sec. 111.55). The award of the arbitrators, subject to judicial review is final and endures for one year (Secs. 111.59 and 111.60). Strikes are forbidden and are made a misdemeanor (Sec. 111.62). The Wisconsin Employment Relations Board is made responsible for the enforcement of the subchapter and is authorized to compel compliance by commencing an action in a circuit court.

ment were unsuccessful. On October 3, 1949, the Wisconsin Employment Relations Board issued an order listing five names as a panel of arbitrators, and ordering the union and the company each to strike one name therefrom, pursuant to provisions of Sec. 111.55, Wis. Stats. The remaining three were to act as arbitrators. On October 4, 1949, the plaintiffs and other employees, acting in concert and agreement, left their employment and started picketing the premises of the company.

On October 6, 1949, the union and the company agreed upon wages, hours, and other conditions of employment but did not agree upon the terms and conditions of the pension plan. The Wisconsin Employment Relations Board and the Attorney General, so the complaint herein alleges, threatened to compel the plaintiffs to submit the unresolved issues of pensions to arbitrators.

On October 13, 1949, in an action commenced in the Circuit Court of Milwaukee County, wherein the Wisconsin Employment Relations Board was plaintiff, the plaintiffs herein were enjoined from calling a strike, or going out on strike, or causing an interruption in the service of the company. It was further ordered that certain of the officers of the union notify all employees who had been called out on strike to resume their employment. This order was issued pursuant to subchapter 3 of Chap. 111. The Attorney General and the Wisconsin Employment Relations Board thereafter caused process to issue looking to the punishment of the plaintiffs and other employees for violating said injunction. The Attorney General likewise threatened to invoke criminal penalties.

In the case at bar, after putting in issue various allegations of the complaint, the defendants pleaded that prior to the commencement of the case at bar plaintiffs chose as their forum for the litigation of the same issues the Circuit Court of Milwaukee County, in which action, on demurrer, the court entered judgment that subchapter 3 of Chap. 111, Wis. Stats. of 1947, was constitutional and valid. Defendants plead such State court action as res judicata.

We proceed to a consideration of the defense of res judicata. The judgment of the Circuit Court of Milwaukee

County, which is pleaded as a bar, provided in part as follows:

> "It Is Hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, . . . any rights, privileges or protection secured to them under either of said Constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947."

An appeal from this judgment was taken by the plaintiffs in that case to the Supreme Court of Wisconsin, which court affirmed the Circuit Court judgment. Plaintiffs did not appeal to the United States Supreme Court or seek other relief from the action of the Wisconsin Supreme Court. Since the time for appeal to the United States Supreme Court has long since elapsed, the judgment of the Circuit Court, affirmed by the Wisconsin Supreme Court, is conclusive. *Angel v. Bullington*, 330 U. S. 183, 189. See also: *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470, 475; *Mitchell v. First National Bank of Chicago*, 180 U. S. 471, 480.

The judgment of the Circuit Court of Milwaukee County, affirmed by the Wisconsin Supreme Court, is res judicata, and bars a subsequent action in this court, if it falls within the rule that a judgment of a State court of competent jurisdiction is binding and conclusive as to all matters put in issue and decided in the State court, and bars a subsequent action in a federal court if the causes of action, subject

matter and parties are the same. *Angel v. Bullington*, supra, pp. 192-193; *Treinies v. Sunshine Mining Co., et al.*, 308 U. S. 66, 75-78. Indeed such a judgment is binding as to all relevant issues which could have been raised and litigated therein. *Heiser v. Woodruff, et al.*, 327 U. S. 726, 735; *Troxell, Administratrix v. Delaware, Lackawanna & Western Railroad Co.*, 227 U. S. 434, 440; *Reinkey v. Wilkins*, 172 Wis. 515, 520.

We think it clear that the causes of action and the subject matter are the same in the two suits. The cause of action in the case at bar is based upon the same facts as in the State court action. This is so even though some of the actions which could only be considered in a prospective way by the State court have since come to pass. The fact that a strike was actually called since the State court judgment was rendered does not create a different situation. The allegations in the pleadings in the two cases are substantially the same. The facts necessary to sustain the two actions are the same. As for the subject matter, the issues in the case at bar and in the State court action arose from the claimed repugnancy of subchapter 3 of Chap. 111, Wis. Stats., to the federal Constitution and to the Labor-Management Relations Act of 1947, and those issues were decided against the union in the State court action. The questions essential to a determination herein are the same as those of the State court case.

It is true that the opinion of the Wisconsin Supreme Court contains some equivocal language which furnishes some foundation for the contention of plaintiffs herein that all of the issues were not squarely met. Nevertheless it is the action which the Supreme Court took which is important rather than any reasons which it might give for such action. The appeal was from the judgment of the Circuit Court. Included in the issues squarely raised were the claimed repugnancy of subchapter 3 of Chap. 111 to the federal Constitution and to the Labor-Management Relations Act of 1947. The Wisconsin Supreme Court was empowered to reverse, affirm or modify the Circuit Court judgment; it did not reverse or modify, but affirmed the judgment without

any condition or qualification. The mandate of the Wisconsin Supreme Court did not affirm an order sustaining a demurrer, but rather it affirmed the judgment of the Circuit Court of Milwaukee County in that case. Moreover, it is not important whether we refer to the judgment which was affirmed as a judgment of the Circuit Court or of the Supreme Court.

Plaintiffs' argument that all of the merits of the controversy were not passed upon is conclusively answered in *Angel v. Bullington*, supra, where the controlling opinion holds (p. 190):

> "It is suggested that the North Carolina Supreme Court did not adjudicate the 'merits' of the controversy. It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the States . . .
>
> "The 'merits' of a claim are disposed of when it is refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the 'merits' of that claim were adjudicated in the only sense that adjudication of the 'merits' is relevant to the principles of res judicata . . ."

As the State court litigation, in both the Circuit Court and Supreme Court, involved questions and issues identical to those present and raised in the instant action, and the plaintiffs not having appealed to the United States Supreme Court, it follows that, if the parties to each of the actions are the same, plaintiffs herein are precluded from further litigating the questions and issues in this action under the doctrine of res judicata.

We now focus our attention on the question whether the parties to the State court action were the same as the parties

in the case at bar. Manifestly they are not identical. Certain individuals are named in the pleadings in the case at bar, both as plaintiffs and defendants, who were not thus named in the State court action. The union and Thomas Lansing, its then president, were plaintiffs in the State court action and they are also plaintiffs in the case at bar. The parties plaintiff are not changed because the amended complaint herein now names Arthur St. John, the current president of the union, and lists other officers of the union and members of its bargaining committee. Plaintiffs in both cases are the union and the officers thereof who represent the membership. We hold that the parties plaintiff are the same in both actions.

The Wisconsin Employment Relations Board and the Milwaukee Gas Light Company were named defendants in both actions. In addition, the three individuals who are the Wisconsin Employment Relations Board are named individually in the case at bar, as well as Thomas E. Fairchild, the Attorney General of the State of Wisconsin. However, the three members of the board are sued in the present action only as members of the board, and not in their capacity as private citizens. The Attorney General is sued only in his official capacity, that of attorney representing the Wisconsin Employment Relations Board. We hold that the parties defendant are the same in both actions.

The fact that the union seeks an injunction in the case at bar in addition to the declaratory judgment sought in both cases does not prevent the judgment in the State court action from operating as an estoppel in this court. 50 C. J. S., Judgments, Sec. 900 (a). A change in the form or measure of the relief asked in the complaint in a second cause of action does not preclude the application of the doctrine of res judicata. 30 Am. Juris., Judgments, Sec. 176.

A valid distinction cannot be drawn between a judgment entered in a State court action sustaining a demurrer to a complaint and a judgment rendered after a trial upon the merits. In *Northern Pacific Railway Co. v. Slaght,* 205 U. S. 122, 130, the court stated:

> ". . . It is well established that a judgment on demurrer is as conclusive as one rendered upon proof."

In *Ellis v. Northern Pacific Railroad Co.*, 80 Wis. 459, 465, the court said:

> ". . . It is sufficient to say that by repeated decisions it has become the settled law in this State that the decision of this court upon a demurrer is conclusive upon the questions legitimately involved and is res adjudicata in that case . . ."

In *Lewko v. Chas. A. Krause Milling Co.*, 219 Wis. 6, 8, the court said:

> "The plaintiff first argues that a decision sustaining a demurrer is not res judicata because there has been no trial upon the merits. In this connection it is considered that the plaintiff is in error . . ."

It follows that each member of the union upon whose behalf the State court action was brought is bound by the judgment that was entered in that action. This court has no discretion to pass upon the merits of the important questions raised in the case at bar, and ignore the defense of res judicata. In *30 Am. Juris., Judgments, Sec. 254,* it is said, at p. 983:

> ". . . Where the prior judgment is properly brought to the attention of the court, the question whether the doctrine of res judicata should be applied is one of law, and not for the discretion of the court."

The full faith and credit clause of the United States Constitution (Art. IV, Sec. 1) applies to federal courts. *28 U.S.C. 1738.* Federal courts are required to give full faith and credit to the judgments of State courts. *Davis* v. *Davis,* 305 U.S. 32, 39-40.

The defendants' defense of res judicata must be sustained. Formal findings of fact and conclusions of law, together with formal judgment, will be prepared by counsel for defendants and submitted to counsel for plaintiffs for approval as to form, and if so approved then to the court for signatures and entry; but if not approved, then, upon notice, to the court for settlement, signatures and entry.

Dated at Milwaukee, Wisconsin, this 28th day of April, A. D. 1950.

(Sgd.) F. RYAN DUFFY,
U. S. Circuit Judge;

(Sgd.) PATRICK T. STONE,
U. S. District Judge;

____ ____,
U. S. District Judge.

DISSENTING OPINION OF HONORABLE ROBERT E. TEHAN, United States District Judge

The majority opinion states the facts which brought this action to this court and concludes that the plaintiffs have already had a complete adjudication in the State courts of all of the issues they raise here and thus are now barred from litigating these issues by the doctrine of res judicata. Our dissent is prompted by the belief that the issues raised in this action were not finally adjudicated in the State action and that plaintiffs are entitled to an adjudication of these issues.

In the complaint which plaintiffs filed in the Circuit Court of Milwaukee County, Wisconsin, plaintiffs alleged that subchapter 3 of Chap. 111, Wis. Stats., 1947 was void in that it was in conflict with the Wisconsin Constitution, the Federal Constitution and the Labor Management Relations Act.

The judgment of the Circuit Court adjudicated each of the issues raised in the plaintiffs' complaint in that action. This judgment was then appealed to the Supreme Court of the State of Wisconsin, and that court issued an opinion and affirmed the judgment of the Circuit Court.[3] The majority opinion herein holds that the Circuit Court judgment, affirmed by the Wisconsin Supreme Court, is conclusive to bar plaintiffs in this action.

I question first the assertion that the judgment of the Circuit Court of Milwaukee County is a bar in this action.

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[3] *United G., C. & C. Workers* v. W[illegible] *E. R. Board*, 255 Wis. 154, 38 N. W. (2d) 692.

When a party appeals from a judgment of a Circuit Court of Wisconsin to the Wisconsin Supreme Court, and the Circuit Court's judgment is affirmed, is the judgment which then determines the rights of the parties to that action the judgment of the Circuit Court? The Wisconsin Supreme Court has said that it is not.

In the case of *Ean* v. *The Chicago, Milwaukee & St. Paul R. Co.*, 101 Wis. 166, the Supreme Court considered the effect of its affirmance of a Circuit Court judgment. In that instance, the Supreme Court had affirmed a judgment of an action commenced in the superior court of Milwaukee County. After the appeal was determined, the cause was remanded. Then, within one year of the date of the entry of the judgment in the superior court, that court entered an order vacating its judgment and permitted the plaintiff to plead further. The order purported to be made under the provisions of R. S. 1878, sec. 2832. The provisions of this section, according to the Supreme Court opinion, were "substantially to the effect that the court or judge may, in discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment against him 'through his mistake, inadvertence, surprise or excusable neglect'." The court held that the section applied only to judgments of the Circuit Court and "not to those which by operation of law have become judgments of this court." The court clearly held that when a mandate is remanded and the lower court enters a final judgment in accordance therewith, "the judgment so entered is, in legal effect, the judgment of this court. It is none the less true in cases where there is an affirmance than when some other directions are given." In other words, the court noted that after an appeal, the judgment in any case is the judgment of the Supreme Court and that the legal consequences of that judgment are not necessarily identical as those which attach to the lower court judgment. To the same effect see *Crowns* v. *Forest Land Co.*, 100 Wis. 554 and *Hoan* v. *Journal Co.*, 241 Wis. 483. Thus we see that when a judgment of the Circuit Court is considered by the Supreme Court and the Supreme Court renders an opinion as to the propriety of that judgment, the Supreme

Court has, in legal effect, issued a new judgment which becomes the judgment of that case. Therefore, it is only the judgment of the Supreme Court which can be pleaded in bar under the doctrine of res judicata.

The full faith and credit clause of the United States Constitution requires that in any particular instance a Federal Court must give to a judgment of a State Court the same legal effect as the courts of that state would give to it. *Covington v. First National Bank*, 198 U. S. 100; *Jarrard v. Southeastern Shipbuilding Corporation*, 163 F. (2d) 960. In the instant case, we must consider the judgment which is pleaded in bar in the light in which it should be considered by a Circuit Court of Wisconsin had the plaintiffs commenced this action in such a court. We think that in striving to determine what legal effect the courts of Wisconsin would give to the judgment now pleaded in bar, it is proper that we look to the opinion which the Supreme Court rendered at the time it handed down its judgment in that case. In so doing we recognize that there is a distinction between a judgment or findings of fact and an opinion. *49 C.J.S. sec. 4.* But we believe that since an opinion explains the basis in law upon which the judgment is rendered, it is a proper guide in determining what the legal effect of that judgment should be. It is proper for a Federal Court to examine the opinion of a State Court to see what issues were determined. *San Jose Land and Water Co. v. San Jose Ranch Co.*, 189 U. S. 177; *Gross v. United States Mortgage Co.*, 108 U. S. 477; *Carson v. Three States Lumber Co.*, 142 F. 893, affirmed 149 F. 377.

The majority opinion herein dismisses the Supreme Court opinion with the observation that it contains "some equivocal language which furnishes some foundation for the contention of plaintiffs herein that all of the issues were not squarely met." They pass over language which seems to us clearly to indicate that the Supreme Court felt it should not pass on certain constitutional questions until a factual situation was presented to the Court at a later date. The majority opinion places complete reliance on the words "Judgment Affirmed", which appear at the end of the opinion.

If the Supreme Court had merely affirmed without opinion there would be no dissent, and if the Supreme Court's opinion had discussed only one of the constitutional questions and remained silent on the other questions raised by plaintiffs, we would have reluctantly concurred.

The clear language of the Supreme Court's opinion on its position on certain constitutional questions requires, in my mind, the same consideration and treatment that was given by a distinguished court in the case of *Moran Towing and Transportation Co., Inc. v. Navigazione Libera Triestina, S.A.*, 92 F. (2d) 37. We think the Second Circuit Court of Appeals was there confronted with the same problem we face here. The Moran Company had furnished tugboat service and a tug master as a pilot for the N.L.T. under a contract which provided:

> " 'When the captain of any tug engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or any other licensed pilot becomes a servant of the owner in respect to the giving of orders to any of the tugs engaged in the assisting service and in respect to the handling of said vessel and neither the tugs or their owners or agents shall be liable for any damage resulting therefrom.' "

During the maneuvering of the vessel, property of The Robins Company was damaged and it sued Moran and N.L.T. in the New York State Courts for damages. The trial court found negligence on the part of the pilot, directed judgment for The Robins Company against Moran, and dismissed the complaint against N.L.T. The trial judge filed an opinion which was made part of the judgment roll in the State Court in which he indicated that he adjudged that Moran could not divest itself of liability to a third person by means of such a contractual provision and also that the contractural provision would not relieve Moran even as to N.L.T. because the tug master who performed the pilot duties was not a licensed pilot such as the clause called for.

An appeal was taken from this judgment to the New York Appellate Division which affirmed the judgment without opinion. Then an appeal was taken to the Court of Appeals which also affirmed the judgment and issued an opinion. Thereafter, Moran paid the judgment and brought action in Federal Court against N.L.T. to recover the amount of the judgment and its disbursements, claiming that N.L.T. was an indemnitor under the terms of the "pilotage clause". The trial court dismissed the libel on the ground that the issue of liability for the acts of the pilot had been determined by the State Court and could not again be litigated. This judgment was appealed to the Circuit Court of Appeals, and it is the opinion of this court, composed of Circuit Judges Learned Hand, Augustus N. Hand and Harrie B. Chase (the opinion was written by Augustus Hand) which we cite in support of our position. The court looked to the language of the State Court opinions to determine what it was that the trial court and then the Court of Appeals had decided. It concluded that while the Court of Appeals had affirmed the judgment of the trial court, the language which the Court of Appeals used in its opinion indicated that it did not agree with the total adjudication of the trial court. This conclusion was based upon the assumption that it was proper to look to the opinion of the State Courts to determine what was there decided. The propriety of this assumption was discussed by the court,

> "The appellee, however, cites Russell v. Russell, 134 F. 840 (C.C.A. 3), and Oglesby v. Attrill, 20 F. 570 (Wallace, J., in U.S. Circuit Court), as holding that an unconditional affirmance of a judgment by an appellate court, though rendered on entirely different grounds or only on some of the grounds upon which the decision of the lower court was rendered, leaves the questions determined by the lower court as res judicata in all respects. To treat as controlling the findings of a trial court when the appellate court upsets or disregards them and renders a decision of affirmance on different grounds furnishes parties to other litigations affected by the decision a false guide. There seems to be a paucity of authority on this question, and with all due re-

spect we cannot subscribe to such a formal treatment of the situation. * * *"

We, too, feel it is not proper to deprive parties of substantial rights by "a formal treatment of the situation".

In the Moran case the Circuit Court of Appeals did not hesitate to look to the opinion of the State Appellate Court to determine that the judgment of the appellate court was different than that of the State trial court. So in the instant case we look to the opinion of the Wisconsin Supreme Court which, to us, indicates clearly that its judgment was different than that rendered by the circuit court.

Let us now examine the opinion of the Wisconsin Supreme Court in this case in the light of the Moran case. The plaintiff public utility employees and their union claimed they were aggrieved by an act of the Wisconsin legislature and commenced an action for declaratory relief, alleging that the act of the legislature was violative of their rights under the Constitutions of the United States and State of Wisconsin and repugnant to the Labor Management Act of 1947. The defendants demurred and the circuit court sustained the demurrer and entered judgment finding against plaintiffs on each of these grounds. The matter was appealed to the Wisconsin Supreme Court and that court, after reciting the facts, began its opinion with the following language:

> "We are first confronted with a fundamental rule of law that the constitutionality of a statute is not to be determined as a hypothetical question or upon assumed facts or unreal possibilities. The court should not anticipate a question of constitutional law before it is to be applied to the precise facts before it and should not attempt to test the operation of a law under every conceivable set of circumstances. This rule is illustrated by the following quotations from prior decisions of this court:
>
> "'Sound judicial policy precludes the court from considering the question of the constitutionality of a legislative act unless a decision respecting its validity is essential to the determination of some controversy

calling for judicial solution.' *State ex rel. Rosenheim v. Frear*, 138 Wis. 173, 176, 119 N. W. 894.

"'The legislature, subject to the constitutions of the United States and of this state, is supreme in its particular field, and this court will not declare laws unconstitutional unless it clearly appears beyond reasonable doubt that they contravene constitutional provisions. See *Payne v. Racine*, 217 Wis. 550, 259 N. W. 437; *Petition of Breidenbach*, 214 Wis. 54, 252 N. W. 366; *Doering v. Swoboda*, 214 Wis. 481, 253 N. W. 657; *State ex rel. Carnation M. P. Co. v. Emery*, 178 Wis. 147, 189 N. W. 564, and the numerous earlier decisions cited therein.' *State ex rel. Atty. Gen. v. Wisconsin Constructors*, 222 Wis. 279, 284, 268 N. W. 238.

"'A constitutional question will not be decided until it is brought directly in issue by the facts involved in the instant case.' *Democrat Printing Co. v. Zimmerman*, 245 Wis. 406, 411, 14 N. W. (2d) 428.

"Therefore, upon this record, we can only determine whether or not ch. 414, Laws of 1947, is a valid and constitutional enactment. The plaintiffs contend that it is not because it contains unlawful delegations of legislative and judicial powers. * * *"

The court's opinion proceeds to a discussion of the questions of delegation of legislative and judicial powers (neither of which issues is involved in these proceedings), decides the issue of delegation of legislative powers, and continues with the following language:

"Upon the record here there is no question of the delegation of judicial power. This question and other contentions and arguments of the plaintiffs can be disposed of best when a case involving a particular question is presented and fully argued. If any person or agency, in the enforcement of the law, should attempt to usurp unlawful legislative or judicial powers there is an adequate remedy."

The Wisconsin Court's opinion in effect says: We will not decide the principal constitutional objections raised by the

plaintiffs. We will only decide the question of whether the statute in question involves an unlawful delegation. The door, however, is not closed on your grievances. At a more propitious time and place, when a matured fact situation has developed, you will have your day in court.

Abbreviating the court's own language, it said:

> "The court should not anticipate a question of constitutional law before it is to be applied to the precise facts before it and should not attempt to test the operation of a law under every conceivable set of circumstances. * * * Therefore, upon this record, we can only determine whether or not (the statute) is a valid and constitutional enactment. * * * This question (delegation of judicial power) and other contentions and arguments of the plaintiffs can be disposed of best when a case involving a particular question is presented and fully argued. * * *"

Such language would never have been used by a court which did not conclude that a final disposition of the issues again raised in these proceedings was open to a future determination such as sought here.

We must also remember that the action in the State court was one for declaratory judgment. A judgment resulting from a declaratory judgment action is not res judicata to issues which were not actually determined. *Restatement of Judgments*, Sec. 77, Comment b. states:

> "*Effect of declaratory judgment on subsequent controversies.* The effect of a declaratory judgment in subsequent controversies between the parties depends upon the scope of the declaration of rights made by the judgment. As to matters declared by the judgment, the parties are precluded from relitigating them; as to matters not declared by the judgment, although a declaration might have been made as to them, the parties are not so precluded.
>
> "Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant. He is seeking rather a judicial declaration as to the existence and effect of a relation between him and the

> defendant. The effect of the judgment, therefore, unlike a judgment for the payment of money, is not to merge a cause of action in the judgment or to bar it. The effect of a declaratory judgment is rather to make res judicata the matters declared by the judgment, thus precluding the parties to the litigation from relitigating these matters."

The majority opinion places great reliance on the case of *Angel v. Bullington*, 330 U. S. 183. I feel that the Angel case is clearly distinguishable from the case at bar. The majority opinion in the Angel case held that the North Carolina Supreme Court adjudicated all of the federal issues involved when it ruled that it had no jurisdiction to consider the claim of Bullington. In other words, when the North Carolina Court ruled that a state statute removed from North Carolina courts jurisdiction to consider Bullington's claim, there was implicit in that ruling the determination that the state statute was constitutional. I think it is impossible to find in the Wisconsin Supreme Court's statement, that certain issues are not before it because a proper factual situation has not developed, any implicit ruling that the Wisconsin statute is not in conflict with the Federal Constitution or the Labor Management Relations Act.

Another clear basis of distinction rests in the fact that the action before the Wisconsin State court, unlike the Angel case, was one seeking a declaratory judgment, and that a declaratory judgment, as noted in *Restatement of Judgments*, sec. 77, is conclusive only as to matters actually determined and not as to those which might have been determined.

The plaintiffs in the instant case went first to the Wisconsin courts to obtain a ruling on the validity of the Wisconsin statute. The Wisconsin Supreme Court, in my opinion, denied them a complete ruling at that time, but held open the door of the court for their return at some later date when the factual situation warranted such a return.

Following this a strike occurred and the challenged statute was put into operation. Plaintiffs then came to this court and asked for a ruling on the validity of the statute. This we have denied them by the application of res adjudicata. The doctrine of res adjudicata is a wholesome one, but I do not believe it was ever intended to work such a result.

The decision of this court has not only refused them that ruling, but by holding that the Wisconsin decision was res judicata on all the issues raised here, are we not then closing the door to the Wisconsin courts that the Supreme Court of the state held open? There seems substantial authority for the proposition that this court's ruling on the question of res judicata, if it becomes final, will, in turn, be res judicata on that issue and thus bar the plaintiffs from ever returning to the Wisconsin court. *Freeman on Judgments*, 5th Ed., p. 1498.

Dated, Milwaukee, Wisconsin, this 28th day of April, A. D. 1950.

(S.) ROBERT E. TEHAN,
U. S. District Judge.

Endorsed: "Filed June 14, 1950. B. H. Westfahl, Clerk."

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, Individually, and as officers of Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and LOCAL 18, UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, (CIO), *Plaintiffs*,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON and HENRY C. RULE, individually and as Commissioners constituting the Wisconsin Employment Relations Board, and THOMAS E. FAIRCHILD, individually and as Attorney General of the State of Wisconsin, and the MILWAUKEE GAS LIGHT COMPANY, a Wisconsin corporation, *Defendants*

Findings of Fact and Conclusions of Law

The above entitled action having come on for trial before the United States District Court for the Eastern District of Wisconsin on November 28th, 1949, the Honorable F. Ryan Duffy, Patrick Stone and Robert E. Tehan, Judges presiding, and the plaintiffs appearing by Max Raskin and Wm. F. Quick, their attorneys and the defendants, Wisconsin Employment Relations Board and L. E. Gooding, J. E. Fitzgibbon, and Henry C. Rule appearing by their attorney, Thomas E. Fairchild, and the defendant Milwaukee Gas Light Company appearing by Miller, Mack & Fairchild, by Gilbert Hardgrove, their attorneys, and the defendant Thomas E. Fairchild appearing in proper person, and a Second Stipulation of Facts having been filed and the court having heard the arguments and received briefs of all par-

ties, and being fully advised in the premises, does hereby make the following findings of fact and conclusions of law.

Findings of Fact

1. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00) pursuant to Section 1331 of Title 28 of the U.S.C.A.

2. That the plaintiff, Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and hereinafter referred to as the union, is an unincorporated association of employees employed in the production, maintenance, operation, construction and meter reading, of approximately seven hundren seventy (770) in number, all of whom are employed with the defendant, Milwaukee Gas Light Company, and that the office of the said union is in the city of Milwaukee, Milwaukee County, Wisconsin; that it is a labor organization as defined in Section 2-(5) of the Labor Management Relations Act of 1947.

3. That the plaintiff, Chester Walczak, is a citizen of the United States, and a resident of the city and county of Milwaukee, Wisconsin, and is the International Representative of said union.

4. That the plaintiff, Arthur St. John, is a citizen of the United States, and a resident of Waukesha County, Wisconsin, and is the president of the said union. That he is an employee of the Milwaukee Gas Light Company.

5. That the plaintiff, Al Fuhrman, is a citizen of the United States, and a resident of Milwaukee County, Wisconsin, and is the vice president of the said union. That he is an employee of the Milwaukee Gas Light Company.

6. That the plaintiff, Emil Heimsch, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, and is the Chairman of the Bargaining Committee of the Union. That he is an employee of the Milwaukee Gas Light Company.

7. That the plaintiff, Thomas Lansing, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

8. That the plaintiff, John F. Sheehan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

9. That the plaintiff, E. F. Regner, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

10. That the plaintiff, Edward P. Regan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

11. That the plaintiff, La Moine S. Cardinal, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

12. That the plaintiff, Gordon Donnelly, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is the recording secretary of said union. That he is an employee of the Milwaukee Gas Light Company.

13. That the defendant, L. E. Gooding, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Fond du Lac, Fond du Lac County, Wisconsin. The defendant, J. E. Fitzgibbon, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the

United States, and a resident of the city of Milwaukee, Milwaukee County, Wisconsin. The defendant, Harry C. Rule, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Eau Claire, Eau Claire County, Wisconsin. That all of said defendants constitute the Wisconsin Employment Relations Board, which has offices at 110 East Wisconsin Avenue, Milwaukee, Wisconsin. That said Wisconsin Employment Relations Board is established pursuant to and under the Statutes of the state of Wisconsin, 111.03, Wis. Stats. of 1947, and is composed of the aforesaid commissioners; that said Board has for its duty the enforcement and compliance with subchapter 3 of Chapter 111 of the Laws of the State of Wisconsin titled "Public Utilities" as set forth in sections 111.50 through 111.64 Wisconsin Statutes of 1947.

14. That the defendant, Thomas E. Fairchild, is the duly elected, qualified, and acting Attorney General of the State of Wisconsin, and as such is charged with the enforcement of the laws of the State of Wisconsin, is a citizen of the United States and is a resident of the Village of Verona, Dane County, Wisconsin.

15. That the members of the union, including the plaintiffs, have assembled and associated themselves in the said union for the purpose of collective bargaining and otherwise dealing with the defendant company concerning hours of employment, rates of pay, pensions, working conditions, grievances arising out of employment, and for other mutual aid and protection, and by such means to improve their economic and social conditions as citizens of the United States.

16. The Labor Management Relations Act of 1947, adopted by the Congress, is a law regulating commerce as set forth in Section 101 and Section 204 of the Act as amended. That since 1937, to August 1st, 1943, the defendant company recognized the plaintiff union as the exclusive bargaining representative for all of its employees performing production and maintenance work, for the purpose of

bargaining with respect to rates of pay, hours of employment, and other conditions of employment, and that on August 1st, 1943, the plaintiff union was duly certified by the National Labor Relations Board, acting under the National Labor Relations Act of 1935, as the exclusive bargaining representative for all of the employees of the defendant company in said unit, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment.

17. That commencing with June, 1937, and annually thereafter, including June, 1948, the plaintiff union and the defendant company entered into collective bargaining agreements for wages, hours of employment, and other working conditions of all of the employees represented by the said union.

18. That the defendant company is a Wisconsin corporation, and is a public utility employer with offices located at 626 East Wisconsin Avenue, Milwaukee, Wisconsin; and is primarily engaged in the furnishing of illuminating and heating gas to the general public in the cities of Milwaukee, West Bend, West Allis, Wauwatosa, Port Washington and Hartford, and the villages of Shorewood, West Milwaukee, Whitefish Bay, River Hills, Fox Point, Menomonee Falls, Grafton, Slinger, Thiensville, Germantown, Saukville and Jackson, and the townships between the City of Milwaukee and the said outlying cities and villages in the State of Wisconsin. The total franchise area served exceeds five hundred square miles. The total population of the area is nearly eight hundred thousand. The number of customers exceeds two hundred thousand.

19. That the plaintiffs bring this action on behalf of themselves and all others similarly situated, that is to say, the members of the union who are also employees of the defendant company and are authorized so to do.

20. That on or about September 3, 1948, the plaintiff Local 18, United Gas, Coke & Chemical Workers of America commenced an action in the circuit court for Milwaukee

County, Wisconsin, as plaintiff against the Wisconsin Employment Relations Board and the Milwaukee Gas Light Company, two of the defendants in the above entitled action, praying the court to determine and declare the rights of the parties, and to declare subchapter 3 of Chapter 111 of the Wisconsin Statutes of 1947 unconstitutional and invalid, and to give such further relief by way of declaration of the rights of the parties as might be lawful, just and proper.

21. That on or about October 13, 1948, the summons in said action so commenced in the circuit court for Milwaukee County was amended by adding thereto as one of the plaintiffs Thomas Lansing, who is one of the plaintiffs in this action.

22. That at the same time an amended complaint was served therein. As appears by said amended complaint, said plaintiff union brought said action as the representative of the employees of the defendant, Milwaukee Gas Light Company, being specifically authorized so to do; and that it was therein alleged that said Thomas Lansing had, through many years, built up a property right in his employment commonly known as "seniority", and it was therein charged that sections 111.62 and 111.63 of said chapter 111 of the Wisconsin Statutes of 1947 threatened to destroy said property right by denying him the full protection of the law.

23. That on November 1, 1948, the defendant Milwaukee Gas Light Company interposed in said action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Milwaukee Gas Light Company, one of the defendants in the above entitled action, by Miller, Mack & Fairchild, its attorneys, and demurs to the amended complaint therein on the ground that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

24. That on or about October 29, 1948, the defendant, Wisconsin Employment Relations Board interposed in said

action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Wisconsin Employment Relations Board, one of the respondents above named, by its attorneys Glover L. Broadfoot, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, and demurs to the amended complaint in the above entitled action on the grounds that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

25. That said action was brought to trial on the issues of law raised by the separate demurrers of the defendants therein to said amended complaint, and was heard on the 22nd and 26th days of November, 1948, all of the parties to said action having been represented in court by their respective counsel.

26. That on January 6, 1949, the said circuit court for Milwaukee County, Wisconsin, being of the opinion that subchapter 3 of chapter 111 of the Wisconsin Statutes of 1947 was a valid act, and not in violation of nor in conflict with any provision of the Constitution of the State of Wisconsin, nor the Constitution of the United States, nor of any amendment thereto, and not in conflict with the United States Labor Management Relations Act of 1947, and being further of the opinion and having determined that any further amendment of said amended complaint would be unavailing, ordered that said demurrers to the amended complaint in said action be sustained, and that judgment be entered declaring the rights of the parties and denying the prayer of the plaintiffs, for further relief.

27. That on January 6, 1949, said circuit court for Milwaukee County, Wisconsin entered a judgment as follows:

> "It is hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State

of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them . . . any rights, privileges or protection secured to them under either of said Constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947."

28. That an appeal was taken from the judgment so entered on January 6, 1949, by the plaintiffs in said action to the supreme court of the State of Wisconsin; that thereafter such proceedings were had in said supreme court of the State of Wisconsin; that said judgment of said circuit court for Milwaukee county was affirmed, such judgment of affirmance having been entered on July 12, 1949; and that the remittitur from said supreme court was returned to and filed in the office of the clerk of the circuit court for Milwaukee county, Wisconsin, with no accompanying opinion, declaring that, on consideration of the appeal, it was ordered and adjudged by said supreme court that the judgment of said circuit court of Milwaukee county be and the same was affirmed.

29. That the opinion of the Supreme Court of Wisconsin with respect to the said appeal was filed in the office of the clerk of that court on July 12, 1949, and is reported under the title: *United Gas, Coke & Chemical Workers of America, Local 18, C.I.O. and another vs. Wisconsin Employment Relations Board and another*, 255 Wis. (Advance Sheets) 154-163, 38 N.W. (2d) (Advance Sheets) 692-697.

30. That no application by appeal, writ of error, certiorari or otherwise to have said judgment reviewed by the supreme court of the United States of America has been made.

Conclusions of Law

1. All of the parties in the action at bar were parties, directly or by representation, in the state court action mentioned and referred to in the answers of the defendants in the action at bar.

2. All of the parties in the action at bar upon whom any judgment to be entered therein could operate were parties, directly or by representation, in said court action.

3. All of the issues in the action at bar were adjudicated in said state court action.

4. The causes of action in both actions being the same and the parties being identical or in privity, the judgment of the circuit court of Milwaukee county was affirmed by the Supreme Court of Wisconsin is *res adjudicata* and conclusive of the parties not only as to all the issues adjudicated in that action but as to all issues pertaining to the constitutionality of the statute as applied to the plaintiffs that might have been raised.

5. The declaratory judgment of the circuit court of Milwaukee county, as affirmed by the Supreme Court of Wisconsin introduced into the record in this case, is *res adjudicata* as to all the issues sought to be raised in this action and consequently bars the maintenance of this action.

6. The defendants are entitled to judgment dismissing the above entitled action.

Let judgment be entered accordingly.

Dated June 14th, 1950.

By the Court:

(S) F. Ryan Duffy,
U. S. Circuit Judge.
(S) Patrick J. Stone,
U. S. District Judge.

I dissent from the above findings of fact and conclusions of law for reasons set forth in my dissenting opinion on file herein.

(S) Robert E. Tehan
U. S. District Judge.

And afterwards, to-wit: on the 104th day of said Term to-wit: on the 14th day of June, A. D. 1950, the following proceedings were had, to-wit:

Endorsed: "Filed June 14, 1950, B. H. Westfahl, Clerk."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, Individually, and as officers of Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and LOCAL 18, UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, (CIO), Plaintiffs,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. GITZGIBBON, and HENRY C. RULE, individually and as Commissioners constituting the Wisconsin Employment Relations Board, and THOMAS E. FAIRCHILD, individually and as Attorney General of the State of Wisconsin, and the MILWAUKEE GAS LIGHT COMPANY, a Wisconsin corporation, Defendants.

JUDGMENT

The above entitled action having come on for trial before the United States District Court for the Eastern District of Wisconsin, on November 28th, 1949, the Honorable F. Ryan Duffy, Patrick Stone and Robert E. Tehan, Judges presiding, and the plaintiffs appearing by Max Raskin and Wm. F. Quick, their attorneys and the defendants, Wisconsin Employment Relations Board and L. E. Gooding, J. E. Fitzgibbon, and Henry C. Rule, appearing by their attorney, Thomas E. Fairchild, and the defendant, Milwaukee Gas Light Company appearing by Miller, Mack & Fairchild, by Gilbert Hardgrove, their attorneys, and the defendant,

Thomas E. Fairchild appearing in proper person, and the court having on the 14th day of June, 1930, filed its Findings of Fact, Conclusions of Law and Directions for Judgment,

Now upon all the proceedings herein, It is

Adjudged and decreed that the above entitled action be and the same is hereby dismissed.

Dated June 14, 1950.

By the Court:

F. RYAN DUFFY,
U. S. Circuit Judge.
PATRICK T. STONE,
U. S. District Judge.
ROBERT E. TEHAN,
U. S. District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

Subchapter III, Chapter 111
Wisconsin Statutes

PUBLIC UTILITIES

111.50. Declaration of policy * * *

111.51. Definitions * * *

111.52. Settlement of labor disputes through collective bargaining and arbitration. It shall be the duty of Public utility employers and their employes in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate. (1947 c. 414)

111.53 Appointment of conciliators and arbitrators. Within 30 days after July 25, 1947, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing, in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems.

* * * * * * *

111.54 Conciliation. If in any case of a labor dispute between a public utility employer and its employes, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employes are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute. (1947 c. 414)

111.55 Conciliator unable to effect settlement; appointment of arbitrators. If the conciliator so named is unable to effect a settlement of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the Board as the arbitrator

(or arbitrators) to hear and determine such dispute. (1947 c. 414)

111.56. Status quo to be maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other. (1947 c. 414)

111.57. Arbitrator to hold hearings * * *

111.58. Standards for arbitration * * *

111.59. Award filed with Clerk of circuit court * * *

111.60. Judicial review of order * * *

111.61. Board to establish rules * * *

111.62. Strikes, work stoppages, slowdowns, lockouts, unlawful; penalty. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown, which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor. (1947 c. 414)

111.63. Enforcement. The Board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply. (1947 c. 414)

111.64 Construction. (a) Nothing in this subchapter shall be contrued to require any individual employe to render labor or service without his consent, or to make illegal

the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have the power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith, are to the extent of such conflict concerning the subject matter, dealt with in this subchapter, supplanted by the provisions of this subchapter. (1947 c. 414)

Labor-Management Relations Act 1947

(61 Stats. 136, 29 U.S.C.A. Supp. Sec. 141 *et seq.*)

(Pertinent Parts)

Title I

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in

the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * *

Sec. 8 (a) It shall be an unfair labor practice for an employer . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provision of section 9 (a).

* * * *

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

• • • •

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Sec. 14 (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.

• • • •

Title II

Sec. 201. That it is the policy of the United States that

. . .

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

• • • •